

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JOE'S MIDTOWN AUTO REPAIR,)
)
 Petitioner,)
)
 v.) PCB NO. 07-143
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

NOTICE OF FILING AND PROOF OF SERVICE

TO: James Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on September 25, 2007, we electronically filed with the Clerk of the Illinois Pollution Control Board the Petitioner's Response to Motion to Dismiss, a copy of which is attached hereto.

The undersigned hereby certifies that a true and correct copy of the Notice of Filing, together with a copy of the documents described above, were served upon the Respondent by enclosing same in envelopes addressed to said Respondent by U.S. Mail by depositing said envelopes in a United States Post Office Mail Box at Springfield, Illinois, with postage fully prepaid, on the 25th day of September, 2007.

/s/ Patrick D. Shaw
Patrick D. Shaw

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RESPONSE TO MOTION TO DISMISS

NOW COMES Petitioner, Joe's Midtown Auto Repair, by its undersigned attorneys, pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Admin. Code § 101.500), responds to the Motion to Dismiss filed by the Illinois Environmental Protection Agency (hereinafter "Illinois EPA"), stating as follows:

1. On or about September 10, 2007, Petitioner filed a Petition for Review of an Illinois EPA LUST Fund determination pursuant to Section 57.8 of the Illinois Environmental Protection Act (hereinafter "the Act"). Petitioner complained that the Illinois EPA had illegally charged a second deductible for the project. (Petition, at ¶ 7)

2. On or about September 17, 2007, Illinois EPA moved to dismiss the Petition, characterizing this as an appeal from previous OSFM deductibility determinations.

3. As an initial procedural matter, Petitioner does not believe the motion is an appropriate vehicle for the evidentiary grounds raised. Section 105.108 of the Board's Procedural Rules enumerates the situations in which a petition may be dismissed. (35 Ill. Admin. Code § 105.108) None of the four specific situations apply here, but dismissal may still be appropriate if "other grounds exist that bar the petitioner from proceeding." (35 Ill. Admin.

Code § 105.108(e)) Petitioner submits that these “other grounds” must be like in nature to the four specific grounds given, which categorically involve defects clear from the petition itself or from previous Board rulings. The motion to dismiss is supported by portions of Agency records which it has not yet filed with the Board. Petitioner submits that such an evidentiary motion is not proper grounds for a motion to dismiss.

4. Turning to the substantive issue, Petitioner restates that it is appealing the Illinois EPA’s determination of the amount of reimbursement (Petition at ¶ 6 & Ex. A), pursuant to authority of Section 57.8(I) of the Act. (415 ILCS 5/57.8(I))

5. The Illinois EPA’s reimbursement determination wrongfully applied a second deductible. (Petition, at ¶ 7) It is the responsibility of the Illinois EPA, not OSFM, to properly apply the deductible for each site. (415 ILCS 5/57.9(b))

6. The Illinois EPA does not specifically address the issue of two deductibles, but it did file records showing two incidents were reported from the same site, each of which OSFM determined were subject to a \$10,000 deductible. The Board has previously interpreted Section 57.9(b) of the Act as assessing deductibles per site, not per occurrence. Swif-T-Food Mart v. IEPA, PCB 03-185, at p. 11 (May 20, 2004) In doing so, the Board rejected the same arguments being presented here, namely that the Illinois EPA is merely adhering to OSFM’s prior deductibility determinations and any relief petitioner seeks should have been sought by appealing the OSFM’s final determinations many years previously. Id. at p. 7.

7. Petitioner submits that the Motion to Dismiss is in direct contravention of the Board’s ruling in Swif-T-Food Mart and accordingly should be denied outright.

WHEREFORE Petitioner prays for an order denying the motion to dismiss and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

JOE'S MIDTOWN AUTO REPAIR, Petitioner,

By: MOHAN, ALEWELT, PRILLAMAN & ADAMI

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